No. 75-735

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER PANDILIDIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of wilfully failing to file timely federal income tax returns for 1968 and 1969, in violation of 26 U.S.C. 7203. The court sentenced him to concurrent one-year terms on each count, 11 months of which were suspended on the condition that he serve 30 days in a jail-type institution. The court of appeals affirmed (Pet. App. 1a-8a).

The relevant facts are as follows: During 1965-1967, petitioner was employed by the H & R Block Company as a preparer of tax returns (Tr. 14-18, 250-254).[1] During 1968 and 1969, petitioner practiced law in Cincinnati, Ohio. As part of his law practice, he prepared federal income tax returns for a number of his clients (Govt. Ex. 4).

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[1] "Tr." refers to the trial transcript. "R." refers to the joint appendix filed in the court of appeals.

In a form filled out for the Cincinnati Bar Association, petitioner represented that he considered himself particularly qualified in the field of taxation (Tr. 44).

On April 14, 1969, petitioner applied for additional time within which to file his 1968 return (Tr. 116-117). In the application, petitioner falsely stated that he had filed timely returns for each of the preceding three years, when in fact he had not then filed his 1967 return. The Internal Revenue Service granted petitioner an extension of time to May 31, 1969, within which to file his 1968 return. Petitioner made no application for any further extension of time for the filing of his 1968 tax return (Govt. Exs. 3, 3A).

In late 1969 and in February 1970, the City of Cincinnati wrote to petitioner concerning his failure to file City of Cincinnati income tax returns for 1968 (R. 62-64). In March 1970, petitioner filed his Cincinnati income tax return for 1968 (Govt. Ex. 6). The following month petitioner applied for an extension of time for the filing of his 1969 federal tax return (R. 68), in which he again falsely stated that his returns for the three preceding years had been timely filed, even though his 1968 federal return had not then been filed (R. 68; Govt. Ex. 4). The Service granted petitioner an extension to May 30, 1970.

In October and November 1970, the City of Cincinnati wrote to petitioner and requested that he file his delinquent 1969 city income tax returns (R. 74-75). In January 1971, the Internal Revenue Service received an anonymous phone call that petitioner had not filed his 1968 and 1969 federal income tax returns (Tr. 49-50). Shortly thereafter, an investigation was commenced, and on February 18, 1971, petitioner filed the delinquent federal returns (Tr. 4-5; Govt. Exs. 1, 2).

At trial, petitioner testified that his failure to file the returns on time was not due to carelessness or because he was too busy to file them, as he had stated on his extension requests, but because he had had domestic and financial problems (R. 50).

1. Petitioner contends (Pet. 8-17) that the indictment incorrectly stated the dates when his tax returns were due to be filed and that the error was not cured by a bill of particulars subsequently agreed to by counsel. The pertinent facts are as follows:

In August 1973, the indictment was returned, charging that petitioner was required by law to make an income tax return on or before April 15 of 1969 and 1970, and that he willfully failed to make the returns. However, the April 15 dates set forth in the indictment were erroneous because in each year petitioner had been granted an extension of time within which to file his return until May 31 and 30, respectively. When the error was brought to the attention of the court and defense counsel before trial on September 17, 1973, it was agreed by defense counsel at a conference in chambers that a bill of particulars would correct the error (Pet. App. 1a-2a).

Petitioner argues (Pet. 8-17), as he did in the court of appeals, that the error in the indictment could not be cured by a bill of particulars, so that the indictment was fatally defective and must be dismissed. The court of appeals agreed that the indictment could not be amended by a bill of particulars, and further held that the agreement of counsel did not constitute a waiver of indictment because it was not made by the defendant in open court as required by Rule 7(b) of the Federal Rules of Criminal Procedure (Pet. App. 2a-4a). Nevertheless, it affirmed petitioner's conviction on the ground that the error in the indictment and its amendment by a bill of particulars did

"not affect substantial rights" under Rule 52(a) of the Federal Rules of Criminal Procedure and therefore must be disregarded (Pet. App. 4a-7a).

The court of appeals correctly concluded that the mistakes in the dates set forth in the indictment were harmless error.[2] The pertinent part of its opinion states (Pet. App. 7a):

> In this case, the defendant has failed to identify any substantial rights affected by the amendment. It is apparent from this record that the defendant, himself an attorney, at all times knew that the date appearing in the original indictment was erroneous. The defendant was made aware in sufficient time prior to trial that the extended date for filing would be used. Moreover, the defendant, having consented to the filing of the bill of particulars, may not now assert surprise. Additionally, the defendant has not identified any evidence that the prosecutor may have gained through a grand jury proceeding not otherwise available from other sources. Nor can we find from this record any substantial likelihood that the jury's verdict was influenced by its awareness that an indictment had been returned by an impartial grand jury. * * *

In so holding, the court of appeals acknowledged (Pet. App. 3a-4a) that only the grand jury may amend an indictment with respect to a matter of substance (*Ex parte Bain*, 121 U.S. 1; *Stirone* v. *United States*, 361 U.S. 212), and that the dates set forth in the indictment were matters

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[2]Since petitioner's tax returns which were due on their extended filing dates in May, 1969, and May, 1970, were not filed until after the Treasury agents' investigation began in 1971, there is no substance to his argument (Pet. 15-16) that the grand jury might not have indicted had it known the correct due dates.

of substance. But that error does not call for reversal in a case where, as here, the offense was a misdemeanor and could have been charged in an information rather than an indictment and there was no showing that either petitioner or the jury was misled by the mistaken dates. Since petitioner had no right to have his case initially considered by the grand jury, the amendment of the indictment by means of a bill of particulars to which he originally agreed did not affect any of his substantial rights.[3]

Petitioner contends (Pet. 8) and the court of appeals correctly acknowledged (Pet. App. 4a) that the decision below conflicts with *United States* v. *Goldstein*, 502 F.2d 526 (C.A. 3) (*en banc*). There, the Third Circuit held that an indictment charging the misdemeanor of filing false income tax returns could not be amended by the district court to reflect the correct due dates of the returns. It recognized that because the misdemeanor charged could have been brought by information, an indictment was not constitutionally required (502 F.2d at 530), and that the defendant could not claim to have been prejudiced by lack of fair notice of the charge, or by a risk of reprosecution in the event of acquittal (502 F.2d at 529). Nevertheless it reasoned that because the government chose to proceed by indictment, the defendant's right to a determination of probable cause by an independent grand jury was infringed by amendment of the dates in the indictment.

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[3]Contrary to petitioner's argument (Pet. 14), the mistake in the dates set forth in the indictment did not constitute a jurisdictional defect. Unlike this case, *Stirone* v. *United States*, 361 U.S. 212 (Pet. 14), involved a prosecution where the indictment charged interference with the importation of sand and the jury convicted the defendant of interference with the exportation of steel, a completely different offense. Here, however, there is no question that the indictment charged the correct offense of willful failure to file timely income tax returns.

Silber v. *United States*, 370 U.S. 717 (Pet. 14), is similarly distinguishable. There, the indictment omitted an essential element of the

But as the court of appeals here held and the three dissenting judges in *Goldstein* argued (502 F.2d at 531-535), a rule requiring automatic dismissal of an amended indictment in a case that could have been brought by information is an inappropriate sanction where no prejudice to the defendant has been shown. The fact that the government brought an indictment even though an information would have sufficed should not preclude the court from inquiring whether any possible prejudice arose from the amendment of the indictment so as to have deprived the defendant of a fair trial.

Moreover, the mistake in the dates in the indictment in both this case and in *Goldstein* and their respective amendment by a bill of particulars or by the court did not violate the defendants' rights under the Sixth Amendment to fair notice of the criminal charges against them, or the Double Jeopardy Clause of the Fifth Amendment. Thus, petitioner has not been denied any "rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U.S. 18, 23.

In such circumstances we submit that the decision in *Goldstein* is unsound. It wastes both time and legal resources by requiring the prosecution to begin anew in order to correct a harmless error. Apart from this, the *Goldstein* approach appears to have little practical impact since, we assume, a case like this can always be promptly reinitiated by an information drawn in terms of the indictment, with the correct dates, should a district court

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offense and could not be cured by a bill of particulars because Congress provided that the prosecution at issue could only proceed upon an indictment. See *Russell* v. *United States*, 369 U.S. 749, 766-771. As the court of appeals observed, this Court in *Silber* adopted a *per se* rule requiring dismissal of a defective indictment to protect the statutory right to an indictment applicable in that case (Pet. App. 5a).

refuse to permit amendment.[4] Accordingly, while *Goldstein* was incorrectly decided and the court below properly refused to follow it, the issue does not presently appear to be of sufficient importance to warrant review by this Court to resolve the conflict among the circuits.[5]

2. Petitioner furthers argues (Pet. 17-22) that he should have been granted a new trial on the ground of newly discovered evidence that Rev. Neely falsely testified (as a government rebuttal witness) that petitioner's reputation was not good and identified some of the persons he had talked to about petitioner (R. 116-122). In denying the motion for a new trial, the district court correctly concluded that the alleged untrue statements of Rev. Neely were collateral and not material to the main issue, and indicated further that it was not satisfied that Neely's testimony was untrue (R. 30). Thus this case lacks the basic requirement for granting a new trial in this situation that "[t]he court is reasonably well satisfied that the testimony given by a material witness is false" (*Larrison* v. *United States*, 24 F.2d 82, 87 (C.A. 7)).

As the court of appeals correctly held (Pet. App. 8a), a motion for a new trial based on newly discovered evidence is addressed to the sound discretion of the district court. See, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Crowder*, 351 F.2d 101 (C.A. 6). Given

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[4]Even where a felony charge is involved, amendments or withdrawals which do not affect substantial rights protected by the Constitution's requirement for a grand jury are permitted where the effect is to narrow the charges against the defendant or to eliminate surplusage. See *United States* v. *Dawson*, 516 F.2d 796 (C.A. 9), certiorari denied, No. 74-6623, October 6, 1975.

[5]The Third Circuit's decision in *Goldstein* is not of constitutional dimensions. See *United States ex rel. Wojtycha* v. *Hopkins*, 517 F.2d 420, 425 (C.A. 3) (state indictment in case that could have been brought by information may be amended).

the peripheral character of the impeachment testimony at issue, the district court did not abuse its discretion. See *Mesarosh* v. *United States*, 352 U.S. 1, 9.

3. Petitioner also contends (Pet. 22-23) that the trial court's charge to the jury on the element of willfulness did not conform with *United States* v. *Bishop*, 412 U.S. 346. The charge is as follows (R. 128-129):

> *** [A] failure to act is willful if it is voluntary, purposeful, deliberate and with specific intent to fail to do what the law requires.
>
> * * * * *
>
> In order for an act or failure to act to be willful it must be done with a bad purpose to disobey or disregard the law. The only bad purpose necessary for the government to prove in this case is the deliberate—and we are going to repeat that word "deliberate"—intention not to file the returns which the defendant knew he was required to file at the time he was required to file them.
>
> Now, a couple more abstract, and then I am sure your concrete question. We have used the term "deliberate" and we have used the term "specific intent."
>
> The government is required to prove that this omission, if any, was deliberate or with a specific intent. Now, specific intent means that something was done voluntarily; it was done intentionally and not by reason of mistake; * * * .

This instruction accords with *Bishop*, which defined willfulness in terms of a "voluntary, intentional violation of a known legal duty" (412 U.S. at 360).

Petitioner argues (Pet. 22-23) that the trial court erred in not instructing the jury that "willfulness" required an "evil motive." While the Court in *Bishop* referred to its prior formulation of willfulness as "bad faith or evil intent" (*United States* v. *Murdock*, 290 U.S. 389, 398), it is well established that it is not necessary for a trial court to use the particular phrase "evil motive" in charging the jury. See, *e.g.*, *United States* v. *Hawk*, 497 F.2d 365, 366-367, n.2, 369 (C.A. 9), certiorari denied, 419 U.S. 838; *Cooley* v. *United States*, 501 F.2d 1249, 1253, n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *McCorkle*, 511 F.2d 482, 485 (C.A. 7); *United States* v. *Pohlman*, 522 F.2d 974, 976-977 (C.A. 8) (*en banc*), certiorari denied, No. 75-483, January 12, 1976. The trial court's definition of "willful" fullfills the intent of Congress "to construct penalties that separate the purposeful tax violator from the wellmeaning, but easily confused, mass of taxpayers." *United States* v. *Bishop*, *supra*, 412 U.S. at 361.

4. Finally, petitioner argues (Pet. 24-28) that the district court erroneously excluded evidence that an employee of the Internal Revenue Service thought that he was accountable for no more than the civil tax liabilities for the years at issue. Petitioner sought to introduce the evidence to establish that he was not guilty of the criminal offense of failure to file tax returns. But such evidence is not probative of innocence and was properly excluded. As the court of appeals correctly held (Pet. App. 8a), evidence of inconsistent statements by a government agent may not be introduced to prove the truth of the statements. See, *e.g.*, *United States* v. *Santos*, 372 F.2d 177 (C.A. 2); *United States* v. *Powers*, 467 F.2d 1089 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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